IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Donald E. Holbrook, Jr., P.J., and Brian K. Zahra and Donald S. Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

JONATHAN D. HICKMAN,

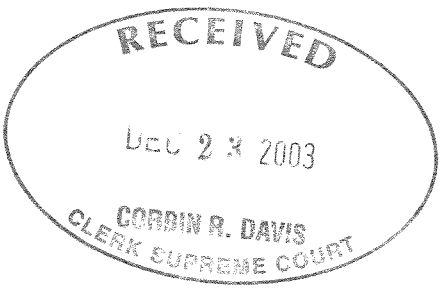
Defendant-Appellant.
_____/

Supreme Court No. 122548

Court of Appeals No. 232041

Circuit Court No. 00-18884 FJ

DEFENDANT-APPELLANT'S BRIEF ON APPEAL



STATE APPELLATE DEFENDER OFFICE

LYLE N. MARSHALL (P49737)
Attorney for Defendant-Appellant
Assistant Defender
340 Business & Trade Center
200 Washington Square, North
Lansing, MI 48913
(517) 334-6069

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

MISCELLANEOUS

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Saginaw County Circuit Court by jury trial, and a Judgment of Sentence was entered on December 13, 2000. A Claim of Appeal was filed on January 11, 2001 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated December 18, 2000, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, § 20, pursuant to MCL 600.308(1); MSA 27A.308, MCL 770.3; MSA 28.1100, MCR 7.203(A), MCR 7.204(A)(2). This Court had jurisdiction to grant the application for leave to appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WAS DEFENDANT-APPELLANT HICKMAN DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL AND HIS STATE AND FEDERAL RIGHTS TO DUE PROCESS OF LAW WHEN HE WAS SUBJECTED TO AN ON THE SCENE IDENTIFICATION PROCEDURE THAT WAS UNDULY AND UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTITY?

Court of Appeals answers, "No".

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant Jonathan D. Hickman was charged with and convicted of armed robbery, MCL 750.529; MSA 28.797, conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), and felony firearm, MCL 750.227b; MSA 28.424(2), in Saginaw Circuit Court following a five-day jury trial, October 10, 2000 through October 18, 2000, the Honorable Fred L. Borchard presiding. On December 13, 2000, and December 15, 2000, Judge Borchard sentenced Mr. Hickman to two concurrent terms of 7 years and 1 month to 10 years and 10 months in prison for armed robbery and conspiracy and a 2 year consecutive term of imprisonment for felony firearm.

Mr. Hickman's convictions stem from allegations by Milton Walker that he was robbed of approximately $26.00 and two two-way radios at approximately 2:00 a.m. on July 11, 2000, as he was walking from a local convenience store parking lot to his girlfriend's house. It was the prosecution's theory that it was Mr. Hickman who held a gun to Mr. Walker while codefendant Richie Harris demanded that Mr. Walker "give up" his radios and then hit him in the face when he did not immediately cooperate. According to the prosecution, as Richie Harris went through Mr. Walker's pockets and pulled out a radio, the money fell out onto the ground. It was alleged that the two men ran off with the radios and the money.

It was the defense theory that Mr. Hickman did not rob Mr. Walker. Instead, Mr. Walker mistakenly identified him at an on-the-scene show up after the police arrested him while walking to his cousin's house in the vicinity of the robbery. Mr. Hickman happened to be wearing similar, but not the same, clothing and was carrying one of the radios that he found on the street moments earlier.

Mr. Walker testified that on July 11, 2000, at approximately 2:00 a.m. he walked to the local convenience store, Circle K, but when he saw that it was closed he began walking to his girlfriend's house. He said that two men approached him from behind and robbed him of two two-way radios and $26.00. He said that one of the robbers, who he later identified as Mr. Hickman, pointed a gun at his face while the other person took the radios and the money. He said that he saw the two run back to the Circle K parking lot and talk with someone in a white car. (96a-106a, 112a). He said that he remembered what each robber wore. Mr. Hickman he said wore a black hooded sweatshirt with a zipper and a red hat. "He had jewelry on. I mean, he had a necklace on. But at first, the way things was going, it appears to me as a cross, but I found out later it was a dollar sign." (110a). He also said that he carried an average size nickel or stainless steel nine-millimeter pistol. (111a). He described the other robber as wearing a three-quarter-length leather coat with a hood, black pants, and a dark blue jersey with gold numbers. (107a-108a). He identified the clothes and the gun in court.

Mr. Walker testified that he called the police from a nearby pay phone and described what happened and what the robbers looked like. A police officer arrived at the pay phone and as Mr. Walker was talking to him the officer left, telling Mr. Walker to remain at the phone booth and that he would return. The officer returned and put Mr. Walker in the police car and drove to South Park Street. The officer asked Mr. Walker to look at a person sitting in a police car and Mr. Walker said: "I told him he was the guy that held the gun." (112a-117a). He said he was still dressed the same. He said that he also identified the other robber at the same location, but that he was not wearing the same clothes. (117a-118a).

During cross examination he testified that he walked to the Circle K with Mookie, who ran off when they heard someone yell "Yo." He remembered a lot of people in the Circle K

parking lot but did not recall seeing the two robbers. He walked two or three blocks to a pay phone to call the police after considering going home to get a gun, but deciding to let the police handle it. (119a-123a). He recalled that the robber with the gun was taller than the other one. He reiterated that the sweatshirt had a zipper and that the hat was "just a red hat." He did not recall that it contained a logo. He acknowledged that he told the police that one robber wore a gold cross around his neck. He admitted that he testified at the preliminary examination that the robber wore black jogging pants. He also acknowledged that the hat in evidence which he identified as the one Mr. Hickman wore had a New York Yankees insignia. (126a-130a). He denied being at the Circle K trying to sell the two-way radios. (134a).

Saginaw Police Sergeant Brent Vanderhaar testified that on July 11, 2001 at approximately 2:20 a.m. he responded to a radio call and drove to the Circle K looking for suspects in reported robbery. The Circle K was empty so he drove down Gage Street and spotted a man fitting the description of one of the robbers. He said the man walked behind his car as he passed and then turned the opposite direction. When he exited his car the man began running. He pursued him on foot and radioed for help. He said that he saw the suspect pull something out from his right side and then he saw something silver or chrome "fly" toward a house. Another officer intervened and the suspect was caught. He identified Mr. Hickman as the person he chased. (136a-143a). Sergeant Vanderhaar testified that he went back and looked where he saw the object thrown and he found a chrome handgun. He said that the radio bulletin occurred at 2:19 a.m. and Defendant was in custody at 2:25 a.m. Approximately ten minutes later Officer Lipe brought Mr. Walker to the scene to identify Mr. Hickman. He said that the other suspect was arrested two houses away. He said that Mr. Hickman had a two-way radio in his hand when apprehended. The police found the other radio behind a house after they pressed the pager

feature and the radio rang. They also found a black jacket approximately three or four feet from the radio. (144a-153a, 154a).

During cross examination he identified the pants Mr. Hickman wore when arrested as black denim jeans, not sweat pants. He acknowledged that Mr. Hickman told him that the gun was not his and that he was on his way to or from his cousin's house. He said that the gun had fingerprint powder on it but he did not know if the gun had actually been tested for fingerprints, even though it was normal procedure to test evidence for prints. (155a-160a).

Saginaw Police Officer Donald Simpson testified that on the same night he answered a radio call reporting that Sergeant Vanderhaar was pursuing a robbery suspect. He said he helped apprehend Mr. Hickman and the other suspect. He said that Mr. Hickman was wearing a red hat and that the other suspect was sitting on a porch. (161a-165a). On cross examination he said that he had to tackle Mr. Hickman to restrain him and that the two-way radio was in Mr. Hickman's pocket. Mr. Hickman gave no statement. He also saw Mr. Walker brought to the arrest scene in a police car. (166a-170a).

Officer Brian Lipe testified that he too responded to the radio call and traveled to Walnut and Genesee Streets where he encountered Mr. Walker who briefly described what happened. He said that while talking to Mr. Walker he received another radio call that a suspect was being chased on foot. He left Mr. Walker and went to help apprehend a suspect. When he arrived he saw Sergeant Vanderhaar and Officer Simpson putting Mr. Hickman in a police car. He said that he helped find the handgun. He said that he then drove back and got Mr. Walker and asked him if he could identify his robbers. When they returned to Mr. Hickman, Mr. Walker identified Mr. Hickman and Mr. Harris as the robbers. He said that Mr. Walker told him that Mr. Harris had

changed his clothes. He also testified that he found a radio and a black jacket in the backyard at 1107 South Park. (171a-187a).

During cross examination he said that Mr. Walker described Mr. Hickman as five feet ten inches tall, about 18 years old, wearing a black hooded sweatshirt, red hat, black jogging pants, silver necklace with a cross, and a chrome gun. He said that Mr. Walker identified the other robber as a black male, five feet seven inches tall, wearing a black coat over a blue and gold jersey with the number 57 or 75 on it. He also said that when Mr. Harris was arrested he wore a black jersey with maroon numbers. He approximated that he left Mr. Walker for 10 to 15 minutes while he helped with the arrests. (188a-195a).

Officer Galvin Smith of the Michigan State Police Forensic Lab testified that he examined the two-way radios, the gun, the magazine, and a bullet for fingerprints. He found no fingerprints on the gun, the magazine, the bullet, and one of the radios. The other radio contained fingerprints but none were useable for identification purposes. He said that there were no signs of water on the gun and it did not appear that it had been wiped off. (196a-200a).

Detective Marcell Turner testified that a LEIN check on the gun revealed that Brian Williams owned it. Mr. Williams told the detective that it had been stolen and that he thought he knew who stole it and it was neither Mr. Hickman nor Mr. Harris. (201a-204a).

The defense's first witness was Defendant Hickman who testified that he was seventeen years old, in the eleventh grade, and lived with his grandmother. He explained that when the police stopped him that morning he was on his way to his cousin's house on South Park Street. While walking he found a two-way radio on the corner of South Park near a pole. He picked it up and put it in his pocket. When he got to the corner of Park and Gage streets he saw a police car pass. He continued to walk and as he approached his cousin's house the police car pulled up

and an officer put him in the car and handcuffed him. Mr. Hickman was wearing a black hooded sweatshirt, a red New York Yankees hat, black jeans, and a medallion in the shape of a dollar sign around his neck. He wore the hat with the bill pointed forward but when he was put in the car the officer turned it around to face backwards. He denied owning or possessing the silver gun. He denied robbing Mr. Walker and taking his money and radios. (205a-209a). During cross examination he continued to deny involvement in the robbery. He also denied that he ran from the police or threw anything in the bushes. (210a-215a).

Carrie Harris, codefendant Harris' mother, testified that her son was at home watching television when the police arrested him at approximately 2:15 a.m. on July 11, 2000. He had come and gone from the house since he left earlier around noon that day. Ms. Harris went outside when she noticed police cars in the street and saw police officers looking for something. She said that her son walked outside to get a cigarette and was arrested. She said that Mr. Harris wore beige pants at the time. She did not recall that he changed his clothes that night. She said that her son did not own a black coat or a blue and gold jersey. (216a-221a).

On cross examination she agreed that she knew her son was home when arrested, but she could not say for sure that he was home just before his arrest. She did not know if and when he left, when he came home, and where he went if he did leave. She told a police officer the night of her son's arrest that she was not sure how long he had been home before he was arrested. (222a-223a).

Codefendant Richie Harris testified that he was eighteen years old and lived with his mother on South Park. He was arrested while at home on July 11, 2000. He said he had been home for two or three hours when the police arrived and arrested him. He had been out earlier that evening across the street at another cousin's house. He did not see Mr. Hickman at all that

night and was not at the Circle K. He denied robbing Mr. Walker or encountering him at all that night. He said he did not own a black jacket or a blue and gold jersey. When arrested he wore beige pants and a black jersey. (224a-230a).

On cross examination he said that he was with Mr. Hickman earlier that day and that Mr. Hickman came over to his house. He recalled a police interview he gave early in the morning on July 11th in which he told the police officer that Mr. Hickman said: "I'm going to go grab some paper." He explained that that meant that Mr. Hickman was going to go home and get some money. He was not sure that he told the officer he was going home to get the money, but that was what he meant. He said that he never saw Mr. Hickman with a two-way radio like those in evidence. He had not seen him with a silver pistol. (231a-241a).

Following closing arguments and jury instructions, the jury deliberated for approximately 4 ½ hours before finding Mr. Hickman guilty of armed robbery, conspiracy, and felony firearm.

Defendant-Appellant claimed an appeal as of right. See MCR 7.203(A). On July 16, 2001, Mr. Hickman filed a Brief on Appeal in the Court of Appeals. On September 17, 2002, the Court of Appeals affirmed Mr. Hickman's convictions in an unpublished opinion per curiam. (242a). Defendant-Appellant then filed an In Pro Per Delayed Application for Leave to Appeal in the Michigan Supreme Court.

On July 3, 2003, this Court granted Defendant-Appellant's application for leave to appeal, limited to the issue whether counsel is required before an on-the-scene identification can be admitted at trial. (246a).

SUMMARY OF ARGUMENT

Defendant Hickman asserts two grounds for error in the instant case. First, he should have been afforded the right to counsel. The United States and Michigan Constitutions provide that in criminal prosecutions the accused has the right to the assistance of counsel for his or her defense. US Const, Am VI. Const 1963, art 1, § 20. The Fifth Amendment right against compelled self incrimination and to due process is a prophylactic right found in the Supreme Court's jurisprudence. US Const, Am V; Const1963, art 1, § 17. The Fifth Amendment right to counsel is separate and not necessarily coextensive with the Sixth Amendment right to counsel. See People v Bladel (After Remand), 421 Mich 39, 50-51; 365 NW2d 56 (1984). The Fifth Amendment right to counsel "is designed to counteract the 'inherently compelling pressures' of custodial interrogation" and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse "with the police only through counsel. McNeil v Wisconsin, 501 US 171, 176; 11 S Ct 2204; 115; L Ed 2d 158 (1991). The safeguards offered by the right apply only when the suspect is in custody. People v Marsack 231 Mich App 364, 374; 586 n234 (1998).

In United States v Wade, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), the United States Supreme Court held that the pretrial lineup is a "critical stage" of the prosecution and that the suspect has a Sixth Amendment right to be represented by counsel. Testimony concerning lineups held in the absence of counsel is excluded *per se*. See id.; Gilbert v California, 386 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967). However, such testimony would be admissible if it could be established that the in-court identification had a source independent of the tainted pretrial identification. Wade, 388 US at 239-241.

In Rivers v United States, 400 F2d 935 (CA 5, 1968), the Fifth Circuit followed a strict reading of Wade. The Court held that most if not all confrontations following arrest would fall within the rules announced in Wade and Gilbert. "[T]he rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information." Rivers, 400 F2d at 939 (quoting Wade, 388 US 218, White dissenting). The Court concluded that the defendant should have been warned of his right to counsel prior to the confrontation with the victim at the hospital. In the absence of an intelligent waiver of counsel, evidence of the confrontation should not have been admitted at trial. Id. at 940.

Where there is no need for an immediate on-the-scene confrontation -- the victim or the suspect is not near death, a jail visit is possible, there is no flight risk, and there is no other reason why "the usual police station line-up" can not be been conducted -- a controlled confrontation at the police station, with all the proper safeguards of a corporeal lineup including the right to counsel should be afforded. See Wade, 388 US 218; Rivers, 400 F2d 935. Cf. Stovall v Denno, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967); People v Dixon, 85 Mich App 271; 271 NW2d 196 (1978).

Second, Mr. Hickman was denied due process where the on-the-scene identification was so impermissibly suggestive that it created a substantial likelihood of a mistaken identification. Stovall and People v Anderson, 389 Mich 155; 205 NW2d 461 (1973), established a due process right of suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. Where the Sixth Amendment holdings in Wade and Gilbert do not apply, Stovall articulated an analogous Fourteenth Amendment right to a fundamentally fair

lineup procedure. Subsequently, Neil v Biggers, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972), and People v Kachar, 400 Mich 78; 252 NW2d 807 (1987), articulated factors to apply where there exists a claimed unnecessarily suggestive identification resulting in a violation of due process. Federal courts now follow a two-step analysis to determine if an identification procedure violates the Due Process Clause of the United States Constitution. The first step requires the Court to determine whether the identification procedure was unduly suggestive. If the procedure was unduly suggestive, the court must then determine, using the Biggers and Kachar factors, whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

This Court has adopted the federal approach in other cases involving impermissibly suggestive identification procedures. In People v Gray, 457 Mich 107; 577 NW2d 92 (1998), this Court reviewed a claim that a single photographic show up was impermissibly suggestive and employed the two-step federal approach to first determine whether the photographic show up amounted to a highly suggestive identification procedure, and if so, under the totality of the circumstances articulated in Biggers and Kachar, whether the victim had an independent basis for the in-court identification.

Eyewitness identification is the primary source of evidence brought against defendants. Every year tens of thousands of individuals become criminal defendants based on eyewitness identifications. Eyewitness identification is also the proven primary cause of wrongful convictions. 77.69% of the first 130 post-conviction DNA exonerations in the United States involved mistaken eyewitness identifications. As a result, the importance of constitutional protections for all identification procedures cannot be overstated.

Thirty years ago this Court recognized that it is a "scientifically and judicially recognized fact that there are serious limitations on the reliability of eyewitness identifications of defendants." Anderson, 389 Mich at 172. It was further recognized that it is a "historical and legal fact that a significant number of innocent people have been convicted of crimes they did not commit" based on eyewitness identifications. Id. Since then, courts have acknowledged and studies have indicated that commonly held assumptions about the creation of memories and the accuracy of identification are wrong, and that many of the factors affecting the reliability of eyewitness impressions are counter-intuitive.

Recently, in a United States Department of Justice research report, *Eyewitness Evidence: A Guide for Law Enforcement,* Attorney General Janet Reno stated that recent cases in which DNA evidence was used to exonerate individuals who were convicted primarily on the basis of eyewitness testimony demonstrate that eyewitness evidence is not infallible. And because eyewitnesses frequently play a vital role in criminal prosecutions, "it is absolutely essential that eyewitness evidence be accurate and reliable."

Defendant-Appellant urges this Court to adopt a two-prong approach to safeguard the rights of suspects subjected to suggestive identification procedures. First, where a suspect is subjected to an unnecessarily suggestive on-the-scene identification procedure the Court should determine if the circumstances in the particular case dictate affording the defendant the full rights attendant to a police station identification procedure, including the right to counsel. Some factors to consider are the temporal proximity of the offense and the identification procedure, geographic proximity of the crime or identification scene and the police station or other suitable site for a corporeal lineup, exigent circumstances like grave injury, illness, flight risk, or other reason for unavailability of the witness or victim requiring an immediate on-the-scene procedure,

and any other reasons why the usual police station lineup is out of the question. Where there is no need for an on-the-scene identification without counsel, a suspect should be taken to the police station and provided a corporeal lineup with the assistance of counsel. See Wade, 388 US 218; Rivers, 400 F2d 935. Cf. Stovall, 388 US at 302 Dixon, 85 Mich App at 279-281.

In order to protect an individual's constitutional right to due process of law and to ensure to the greatest extent possible the accuracy and reliability of eyewitness evidence, where a lineup is determined to be out of the question, this Court should adhere to the two-step approach used by federal courts and adopted by this Court in Gray. The Court should first determine whether the on-the-scene identification procedure was unduly suggestive. Then, if the procedure is found to be unduly suggestive, the Court must then determine, using the Kachar factors, whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

I. DEFENDANT-APPELLANT HICKMAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL AND HIS STATE AND FEDERAL RIGHTS TO DUE PROCESS OF LAW WHEN HE WAS SUBJECTED TO AN ON THE SCENE IDENTIFICATION PROCEDURE THAT WAS UNDULY AND UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTITY.

STANDARD OF REVIEW: The trial court's findings of fact with respect to denial of a motion to suppress are reviewed under a clearly erroneous standard, and its application of law to the facts is subject to *de novo* review. People v Anderson, 389 Mich 155; 205 NW2d 461 (1973); People v Kurylczyk, 443 Mich 289; 505 NW2d 528 (1993); United States v Talley, 108 F3d 277, 281 (CA 5, 1997).

Defendant Hickman was charged with and convicted of armed robbery, conspiracy, and felony firearm in connection with a robbery on the street not far from a local Saginaw Circle K convenience store. At trial, only the complainant testified about the robbers' identity, and that testimony focused primarily on the clothes the robbers wore. Although the complainant did give a general description, it was at best generic and could have applied to many, if not most, of the males in that neighborhood. But even worse, the complainant failed to accurately describe even one of the few distinguishing details. There were no corporeal line ups or photographic show ups in this case. Instead, the complainant identified Mr. Hickman after viewing him in handcuffs in the back seat of a police car in the middle of the night, surrounded by police, and as long as an hour after the robbery occurred.

Mr. Walker, the complainant, identified Mr. Hickman after viewing him in an on-the-scene show up. The police saw Mr. Hickman walking down the street shortly after the robbery was reported. Sergeant Vanderhaar testified that he saw a person fitting the description broadcast over the radio: "black male, dressed in all black, wearing a red hat, and that he was armed with a silver handgun." Mr. Hickman was arrested, handcuffed, and placed in the back seat of a police car. The complainant was later transported to the scene of the arrest and was

asked to view Mr. Hickman in the back seat of the police car in handcuffs. Mr. Walker identified Mr. Hickman as his assailant. Codefendant was brought to the scene and Mr. Walker identified him as the other robber.

Prior to trial, Defendant filed a motion to suppress the identification evidence. At the hearing it was argued that the on-the-scene identification procedure was unduly suggestive and violated Defendant's due process rights. Defendant argued that instead of the on-the-scene procedure, the police should have used a corporeal line up with an attorney present. There were no exigent circumstances. Mr. Hickman was in custody. He was wearing handcuffs. He was not a flight risk. The prosecutor argued that the procedure was proper police work. The trial court stated that when a defendant alleges undue suggestiveness, the burden is on the prosecution to show the procedure was fair and that the police lacked very strong evidence that the suspect was the perpetrator. The court requested testimony about the time frame and "anything else in that regard that you might feel necessary." (17a-26a).

At the hearing the complainant testified that he was robbed where the lighting was good and he was able to see the robbers for three to four minutes. He said that within four minutes he called the police. He testified that Mr. Hickman wore a necklace with a cross. Later he noticed that it was a dollar sign, not a cross. Within a few minutes of his call the police arrived. The police left for five to seven minutes and then returned saying they had someone in custody and were going to take Mr. Walker to view him. (27a-34a). It took two minutes to drive to the arrest scene where the police asked Mr. Walker to get out of the car and look at the suspect sitting in the back seat of the police car in handcuffs. The police asked him if Mr. Hickman was the person that robbed him. (34a-35a). He identified Mr. Hickman as the person who held the gun while robbing him. According to Mr. Walker's responses to the prosecutor's questions, the

police did not suggest that he identify Mr. Hickman. He also identified codefendant Harris at the same location. He estimated that approximately thirty minutes passed from the time he was robbed to when he identified Mr. Hickman in the back seat of the police car. (35a-40a).

During cross examination he testified that the police arrived within three to four minutes and the officer left for five or six minutes. He said the ride to the identification scene took three to four minutes and he sat in the police car at the scene for five to ten minutes. (40a-49a). He said the police took him to the car and asked him: "Is this the person that was involved?" (50a).

Officer Brian Lipe testified that he responded to an armed robbery report and talked with Mr. Walker for about four or five minutes. He left to help chase a suspect and came back to the complainant and told him that the suspect matched his description and asked if he could identify him. He took him to the scene and again asked Mr. Walker if he could identify the robber. When Mr. Walker looked at Mr. Hickman he said: "That's the motherfucker who had the gun." (51a-57a).

On cross examination he said he talked with Mr. Walker for four or five minutes. He then drove eight to ten blocks to help assist chasing a suspect. He remained at the scene for ten minutes and returned to continue interviewing the complainant. They drove to the scene and he identified Mr. Hickman as the gunman. He testified that he did not do the on-the-scene identification for safety reasons or for fear that Mr. Hickman might disappear. He was in the police car in handcuffs with police officers. (58a-68a).

Sergeant Vanderhaar testified that he saw Mr. Hickman four or five minutes after he heard the radio dispatch. He estimated the entire time from the radio dispatch to identification was approximately twenty minutes. He said that the description was that the suspect was a black male, dressed in black and wearing a red hat. (69a-79a).

Defendant Hickman testified that he was arrested, handcuffed, and put in the back of a police car. At some point lights were shone in his face and he heard a police officer ask: "Is this the man?" He said that the whole process took about fifty five to sixty minutes. (80a-83a).

The court ruled that the on-the-scene identification procedure was proper and conducted within a reasonable amount of time. There was nothing unduly suggestive in the way Mr. Hickman was presented to Mr. Walker. He concluded that if the procedure was unduly suggestive, it was harmless error under all the circumstances. (84a-93a).

Defendant Hickman was improperly subjected to an on-the-scene identification procedure that deprived him of the right to counsel and due process of law. The procedure was unduly suggestive and conducive to irreparable misidentification and should have been suppressed.

The Michigan Constitution entitles the accused to representation by counsel at a pretrial identification procedure both before and after commencement of the judicial phase of a prosecution. Const 1963, art 1, § 20; People v Anderson, 389 Mich 155; 205 NW2d 461 (1973); People v Jackson, 391 Mich 323, 328; 217 NW2d 22 (1974). The United States Constitution also entitles the accused to counsel at pretrial identification procedures. US Const, Ams VI, XIV; United States v Wade, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Wade held that the pretrial lineup is a "critical stage" of the prosecution and that the suspect has a Sixth Amendment right to be represented by counsel at the lineup. Testimony concerning lineups held in the absence of counsel would have to be excluded *per se*. See id.; Gilbert v California, 386 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967). However, such testimony would be admissible if it could be established that the in-court identification had a source independent of the tainted pretrial identification. Wade, 388 US at 239-241.

But in 1972 the United States Supreme Court, in Kirby v Illinois, 406 US 682; 92 S Ct 1877; 32 L Ed 2d 411 (1972), limited the right to counsel at lineups to those taking place after formal indictment. The following year, in United States v Ash, 413 US 300; 93 S Ct 2568; 37 L Ed 2d 619 (1973), the Court rejected the extension of Wade's protection to photographic identification procedures. As a result, the right to counsel in federal cases during eyewitness identification has been limited to those cases where a corporeal lineup is held following formal charges. Ash, 413 U S 300.

Despite the subsequent emasculation of the right to counsel provided in Wade and Gilbert and later in Stovall v Denno, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), the foundation of the Wade trilogy was the Court's recognition of the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness identification evidence at criminal trials. Indeed the Court concluded that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." Wade, 388 US at 228. The decisions in the Wade cases provided protection from the threat posed to accurate identification by "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." Id. The Court minimized that threat by prohibiting the admission at trial of evidence of pretrial confrontations at which an accused was not represented by counsel. The Court offered further protection by holding that an in-court identification following an uncounseled lineup was allowable only if the prosecution could clearly and convincingly demonstrate that it was not tainted by the constitutional violation. The crux of the Wade decisions was that the untrustworthiness of eyewitness identification testimony posed an unusual threat to the truth-seeking process. See id.

Stovall v Denno was decided the same year as Wade and Gilbert, and expressed the same concerns about the reliability of identification testimony. The Court in Stovall recognized that, regardless of Sixth Amendment principles, "the conduct of a confrontation" may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. Stovall, 388 US at 301-302. In Stovall, the defendant was arrested the day after the murder and was taken by police to a local hospital where the victim's wife was being treated for wounds. After observing Stovall she identified him as her husband's murderer and later identified him in court. On appeal the defendant claimed a violation of his Fifth, Sixth, and Fourteenth Amendment rights. The Court affirmed the conviction after reviewing the practice of showing a victim a single suspect for identification purposes, and the claim that the practice was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process.

The pretrial confrontation in Stovall was admittedly suggestive, but the Court held that there had been no violation of due process because the unusual necessity for the procedure outweighed the danger of suggestion. The Court reasoned that taking Stovall to the hospital was the only feasible procedure. The hospital was not far from the jail and the courthouse, it was not known how long the wife would live, she could not visit the jail, and under the circumstances: the usual police station line-up . . . was out of the question." Id. at 302.

Stovall established a due process right of suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. The right was enforceable by exclusion at trial of evidence of the constitutionally invalid identification. Where the Sixth Amendment holdings in Wade and Gilbert did not apply, Stovall articulated an analogous Fourteenth Amendment right to a lineup conducted in a fundamentally fair manner. The Court

concluded that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." Id.

In Neil v Biggers, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972), the Court reviewed Stovall and subsequent cases considering the scope of due process protection against the admission of evidence derived from suggestive identification procedures. The Court concluded that general guidelines emerged from the cases "as to the relationship between suggestiveness and misidentification." The "admission of evidence of a showup without more does not violate due process." Id. at 198. The "central question . . . [was] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Id. at 199. It is, the Court concluded, "the likelihood of misidentification which violates a defendant's right to due process." Id. at 198. The Court enumerated five factors to be considered when determining such a likelihood: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. See Id. at 199-200.

In Manson v Brathwaite, 432 U S 98; 97 S Ct 2243; 53 L Ed 2d 140 (1977), the Supreme Court held that the Biggers guidelines apply in post Stovall cases, and rejected a *per se* exclusionary rule for suggestive pretrial identification procedures. The majority of the Court was confident that the "totality of the circumstances" approach of Biggers would adequately serve the purpose of deterring the police from employing unnecessarily suggestive procedures. The Court concluded that "reliability is the linchpin in determining the admissibility of identification testimony . . . ." Manson, 432 US at 114. Federal courts after Manson have followed a two-step

analysis to determine if an identification procedure violates the Due Process Clause of the United States Constitution. The first step requires the Court to determine whether the identification procedure was unduly suggestive. If the procedure was unduly suggestive, the court must then determine whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

A pre Kirby case that discussed the problem in depth was Russell v United States, 408 F2d 1280 (DC Cir, 1969). In that case the Court found that "countervailing policy considerations" would justify prompt confrontations with the victim or eyewitness at the scene of the crime. Delay required to assemble a lineup with counsel "may not only cause the detention of an innocent suspect; it may also diminish the reliability of any identification obtained, thus defeating a principal purpose of the counsel requirement." Id. at 1284. This principle would be applied only to "fresh" on-the-scene identifications that occur within minutes of the witnessed crime. Id. at 1284 n20. These considerations led the Court to conclude that counsel was not required by Wade in prompt on-the-scene identifications. Although counsel is not required, the Court held that a due process test must be applied to determine whether in respects other than absence of counsel the confrontation was "unfair."

Prior to Russell, the Fifth Circuit in Rivers v United States, 400 F2d 935 (CA 5, 1968), reached a contrary conclusion. That decision and those that followed it were based on a strict reading of Wade. The Court held that most if not all confrontations following arrest would fall within the rules announced in Wade and Gilbert. "[T]he rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information." Rivers, 400 F2d at 939

(quoting Wade, 388 US 218, White dissenting). The Court saw Stovall strengthening its position that on-the-scene identifications require counsel. The Court concluded that the defendant should have been warned of his right to counsel prior to the confrontation with the victim at the hospital. In the absence of an intelligent waiver of counsel, evidence of the confrontation should not have been admitted at trial. Id. at 940.

The Court in Russell later reasoned that strict application of Wade's counsel requirement would compel the police in all cases to return the recently apprehended suspect to the station house with consequent delay in arranging the lineup and the presence of counsel. The countervailing considerations are that it is desirable to have an immediate identification while memory is still fresh and the suspect has had no opportunity to change clothes or appearance, and an innocent suspect may be promptly released and the police can continue their pursuit unhampered by delay. Later decisions favored the Russell reasoning.

In Michigan, a criminal defendant's right to counsel has two important constitutional sources. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence." US Const, Am VI. The Michigan Constitution includes virtually the same language: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20.

Another source of a criminal defendant's right to counsel is a prophylactic right found in the Supreme Court's jurisprudence relating to the Fifth Amendment right against compelled self incrimination and to due process. US Const, Am V; Const1963, art 1, § 17. The Fifth Amendment right to counsel is separate and not necessarily coextensive with the Sixth Amendment right to counsel. See People v Bladel (After Remand), 421 Mich 39, 50-51; 365

NW2d 56 (1984). The Fifth Amendment right to counsel "is designed to counteract the 'inherently compelling pressures' of custodial interrogation" and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse "with the police only through counsel. McNeil v Wisconsin, 501 US 171, 176; 11 S Ct 2204; 115 L Ed 2d 158 (1991). The safeguards offered by the right apply only when the suspect is in custody. People v Marsack 231 Mich App 364, 374; 586 n234 (1998).

In People v Anderson, 389 Mich 155; 205 NW2d 461 (1973), where the issue involved a photographic showup, the Michigan Supreme Court reviewed several cases from other jurisdictions and considered the psychological literature regarding photographic identifications and concluded:

> [T]here are serious problems concerning the accuracy of eyewitness identification and that real prospects for error inhere in the very process of identification completely independent of the subjective accuracy, completeness or good faith of witnesses. Id. at 180.

The Court reiterated the Wade maxim that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." Anderson, 389 Mich at 173 (quoting Wade, 388 US at 228). The Court also observed that the major factor contributing to the high incident of miscarriage of justice from mistaken identification has been the degree or suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. Id. at 177.

The Court in Anderson held that the case law developed certain pretrial identification rules. A defendant is entitled to counsel at pretrial identification procedures. See Id. See also Wade, 388 US 218. A pretrial identification which is unnecessarily suggestive and conducive to irreparable misidentification denies the accused's state and federal rights to due process of law.

See Anderson, 389 Mich at 169. See also Stovall, 388 US 293. Where no counsel is present at the pretrial identification or the procedure was unnecessarily suggestive, the trial court must, if requested, hold an evidentiary hearing, out of the jury's presence, at which the prosecutor must establish by clear and convincing evidence, that the in-court identification procedure had a basis independent of the prior identification procedure. See Anderson, 389 Mich at 169. See also Wade, 388 US 218. Direct evidence regarding the pre-trial out-of-court identification is *per se* excluded. See Anderson, 389 Mich at 169. See also Gilbert v California, 386 US 263. On appeal, the reviewing Court must reverse the conviction and order a new trial if identification evidence was improperly admitted, unless it is clear, beyond a reasonable doubt, that the in-court identification did not affect the verdict. If the record is not complete and the appellate court is unable to determine whether the evidence affected the verdict, the Court should vacate the conviction and remand to the trial court for a hearing on the issue. See Anderson, 389 Mich at 169.

The Court concluded from its examination of the case law and the psychological literature that "eyewitness identification through photographs is at least as hazardous as corporeal identification and probably is more hazardous to the securing of correct identifications." Id. at 186. Due to the Court's distrust of photographic identification procedures, it established two ruled regarding its use:

> 1. *Subject to certain exceptions, identification by photograph should not be used where the accused is in custody.*
> 2. *Where there is a legitimate reason to use photographs for identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures.* Id. at 186-187 (footnotes omitted).

Despite the Court's conclusions, it held that although the defendant in that case was in custody before the photo identification occurred, failure to have counsel present at the showup

falls within an exception to the rule. In that case there was a necessity for an immediate identification because the victim was critically ill in the hospital in the middle of the night and "it was not possible to arrange an immediate lineup." Id. at 187.

In a footnote the Court recognized three justifications for absence of counsel at eyewitness identification procedures: 1) Intelligent waiver of counsel by the accused; 2) An emergency situation that requires immediate identification; 3) Prompt, on-the-scene corporeal identifications within minutes of the offense. Id. at 187 n23.

Five years later this Court decided People v Kachar, 400 Mich 78; 252 NW2d 807 (1987), in which the Court approved the rule in Anderson that required that counsel be present at a photographic identification of an accused who is in custody. It also approved the application of the rule that counsel is required at a photographic identification when "[i]ts purpose [is] to build a case against the defendant by eliciting identification evidence, not to extinguish a case against an innocent bystander." Kachar, 400 Mich at 89 (quoting People v Cotton, 38 Mich App 763, 769-770; 197 NW2d 90 (1972)). This Court further reaffirmed that Stovall recognized a ground of attack upon a conviction where the identification procedure followed is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant is] denied due process of law." Kachar, 400 Mich at 90 (quoting Stovall, 388 US at 302). This Court further adopted the standard in Simmons v United States, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968), that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground * * * if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. at 384.

This Court in Kachar opined that the suggestibility of eyewitness identification was the factor that most contributes to the unreliability of such identifications. As a result, courts have "warned against heavy reliance on the reliability of a witness who protest too positively about the source of his identifications, and have held that this testimony must be evaluated in the light of all the circumstances." Id. at 94 (quoting United States v Johnson, 452 F2d 1363, 1369 (CA DC, 1971)). The Court quoted Anderson:

> Given the dangers of misidentification resulting from the vagaries of perception, memory, recognition and the impact of suggestion, it becomes important to understand another factor singled out in Wade and Simmons – the effect upon a witness of having made an identification. Both Wade and Simmons recognize that the first identification may well be irreparable whether right or wrong because the witness who made that identification will be greatly influenced by what he then perceived and decided. Kachar 400 Mich at 94-95 (quoting Anderson, 389 Mich at 21-218).

In response, this Court established in Kachar a totality of the circumstances test, similar to that enunciated in Neil v Biggers, for showing whether an in-court identification has a basis independent of the influences of a prior suggestive procedure. The Court listed eight factors to be considered: 1) whether there is any prior relationship between the witness and the defendant; 2) the opportunity to view the offense; 3) the length of time between the offense and the disputed identification; 4) the accuracy or discrepancies in the description given by the witness and the defendant's actual appearance; 5) whether there was any previous proper identification or failure to identify the defendant; 6) whether the witness previously identified another person as the offender; 7) the nature of the offense and the state of mind of the witness at the point of viewing the offender; and 8) whether the defendant has any idiosyncratic or special features. Kachar, 400 Mich at 95-96. On review, a Court should weigh the various factors, and determine whether the prosecution has established by clear and convincing evidence that a sufficient independent basis

exists to purge the taint of any suggestive procedure. Id. at 97. See also Wade, 388 US 218; Simmons 390 US 377.

In People v Kurylczyk, 443 Mich 289; 505 NW2d 528 (1993), this Court rejected the argument that counsel is required at a photographic identification once an investigation has focused on a particular subject. The Court held that in the case of photographic identifications, the right to counsel attaches with custody. Id. at 302. This Court went on to acknowledge that Stovall established a due process right of suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. As a result the Court held that in "order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." Kurylczyk, 443 Mich at 302 (citing Stovall, 388 US 293; Neil, 409 US at 196). This Court concluded that the relevant inquiry is not whether the photographic showup was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification. Id. at 306.

In People v Gray, 457 Mich 107; 577 NW2d 92 (1998), this Court reiterated the test used in Kurylczyk. The Court held that a photographic identification procedure violates a defendant's due process rights when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. Gray, 457 Mich at 111 (citing Kurylczyk, 443 Mich at 302; Simmons, 390 US at 384). In Gray, after the victim could not positively identify her assailant at a corporeal lineup, at her home she was later shown a single photograph of the suspect after being told that the police had arrested a suspect. She then became sure that the defendant was her attacker. The Court acknowledged that showing a single photograph "is one of the most suggestive photographic identification procedures that can be used," and concluded that the

single photo showup in that case was a "highly suggestive identification procedure." Id. at 111, 114.

This Court then proceeded to the second step of the inquiry, which it stated is to determine whether the victim had an independent basis to identify the defendant in court. Using the Kachar and Biggers totality of the circumstances test, the Court analyzed the facts of the case under the eight Kachar factors, concluding that the victim had a sufficiently independent basis for her in-court identification of the defendant. See Id. at 114-124.

The Michigan Supreme Court has not addressed the issue of whether a criminal defendant subjected to an on-the-scene identification has a right to the assistance of counsel or even a due process right to be free from such a confrontation that, under all the circumstances, is unnecessarily suggestive. Despite this Court's lack of jurisprudence, the Michigan Court of Appeals has addressed the issue. In People v Pendelton, 58 Mich 696; 229 NW2d 525 (1975), the defense, relying on Anderson, Stovall, Gilbert, and Wade, moved to strike the in-court identification because the on-the-scene identification was unconstitutional. The Court held that it was bound by this Court's guidelines in Anderson, specifically that the court must reverse and remand for a new trial unless it is able to declare beyond a reasonable doubt that the in-court identification did not affect the verdict. Stating that the case was fundamentally a case of weight and credibility, the Court of Appeals concluded that beyond a reasonable doubt the in-court identification after the alleged prejudicial on-the-scene confrontation did not affect the case's outcome. Pendelton, 58 Mich 696.

In People v Tucker, 86 Mich App 608; 273 NW2d 498 (1979), without citation to Anderson or the Wade trilogy of cases, held that the defendant was not denied due process or the right to a fair trial. The Court stated that an on-the-scene identification is a well-recognized

exception to the rule requiring counsel during a corporeal identification once a suspect is in custody. It explained that the rationale behind the exception is that "such confrontations are reasonable police practices since they permit the police to immediately determine whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. Defendant's contention that counsel was required is unfounded." Tucker, 86 Mich App at 611.

In People v Dixon, 85 Mich App 271; 271 NW2d 196 (1978),the defendant argued that he was denied his Sixth Amendment right to counsel and to due process where, after he was arrested, he was returned to the victim's home for identification. Citing Anderson, the Court noted that an exception to the right to counsel during a corporeal identification exists where the police apprehend a suspect within minutes of the crime and return him to the scene for identification. The Court further noted, however, that where one of the purposes of an on-the-scene identification is to expedite the release of an innocent suspect, that purpose fails when the police have substantial evidence suggesting that the person in custody is not innocent. The Court held that the suspects in that case were more than a potential suspect whose innocence was in doubt, the police had a significant amount of evidence indicating involvement in the crime. Where there was no need to determine who to take into custody, there was no need for the on-the-scene identification. The Court concluded that a line up should have been conducted at the police station. Dixon, 85 Mich App at 279-281.

In People v Purofoy, 116 Mich App 471; 323 NW2d 446 (1982), the Court relied on the exception articulated in Anderson that counsel is not required at prompt, on-the-scene corporeal identifications within minutes of the offense. The Court rationalized that such confrontations are reasonable police practices since they permit the police to immediately determine whether there

is a reasonable likelihood that the suspect is connected with the crime or an innocent bystander. The Court did agree that the custodial identification may have been suggestive, but nonetheless believed that the procedure employed in that case was reasonable. Purofoy, 116 Mich App at 478-480.

In People v Wilkie, 132 Mich App 140; 347 NW2d 735 (1984), the Court recognized the exception to the rule, that counsel is required for corporeal identifications, where there is a prompt on-the-scene identification, citing Anderson. The panel in Wilkie rejected the Dixon "more than a mere suspicion" standard as too restrictive. Instead, the panel adopted the Turner "middle-ground approach" that allows prompt on-the-scene identifications except where the police have very strong evidence that the person detained is the culprit. Wilkie, 132 Mich App at 142-144.

In the case at bar, the Court of Appeals Opinion below relied on People v Winters, 224 Mich App 718; 571 NW2d 764 (1998), where the issue was whether the defendant's right to counsel established by the Michigan Supreme Court in Anderson was violated. The Court held that it is proper and does not offend the Anderson requirements for the police to promptly conduct an on-the-scene identification. The Court went on to say that such identification procedures are reasonable police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or simply an unfortunate victim of circumstance. Winters, 224 Mich App at 727-728. In that case, after being shot, the victim drove himself to a restaurant approximately a quarter of a mile away and gave police a general description of his assailants. The police drove to the shooting scene and found the defendant in the immediate vicinity. He was driven to where the victim was bleeding profusely and waiting for an ambulance. The victim identified the

defendant as the shooter. The on-the-scene corporeal identification occurred within minutes of the shooting.

A survey of this Court's jurisprudence indicates that this Court has not addressed the right to counsel in on-the-scene identification procedures since People v Anderson was decided in 1973, thirty years ago. And in that case, on-the-scene identification was addressed in a footnote as an exception to the general rule that counsel is required for custodial corporeal identification proceedings. This Court has not addressed the Sixth Amendment right to counsel in this context, nor has it addressed a criminal defendant's right to counsel found in the Supreme Court's jurisprudence relating to the Fifth Amendment prophylactic rule against compelled self incrimination and to due process of law. The Michigan Court of Appeals has nevertheless rendered a number of decisions regarding on-the-scene identifications with mixed results and often without basis in this Court's jurisprudence.

Mr. Hickman was improperly subjected to an unduly suggestive on-the-scene identification procedure that deprived him of the right to counsel. And because the unduly suggestive procedure was conducive to irreparable misidentification, the subsequent in-court identification was improperly admitted at trial. The trial court's ruling and the Court of Appeals Opinion below are clearly erroneous.

In Michigan, a criminal defendant's right to counsel has two important constitutional sources. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance o counsel for his defence." US Const, Am VI. The Michigan Constitution includes virtually the same language: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20.

And the other source of a criminal defendant's right to counsel is a prophylactic rule found in the Supreme Court's jurisprudence relating to the Fifth Amendment right against compelled self incrimination and to due process. US Const, Am V; Const1963, art 1, § 17. The Fifth Amendment right to counsel "is designed to counteract the 'inherently compelling pressures' of custodial interrogation" and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse "with the police only through counsel. McNeil, 501 US at 176.

The unpublished per curiam Court of Appeals Opinion below summarily dismissed Defendant-Appellant's claimed errors without adequate analysis. Defendant's claim that he was denied the right to counsel was rationalized and rejected on grounds not cognizable by the jurisprudence of this Court. Relying entirely on Winters, the Court below justified the counselless confrontation by praising it as reasonable and indispensable police work. It asserted that "whatever the *perceived problems* of on-the-scene- confrontations, it *appears* to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability."

Beyond having no basis in this Court's precedent, one-on-one confrontations fly in the face of now well-accepted data on the untrustworthiness of such confrontations. Indeed, this Court has stated that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." Anderson, 389 Mich at 173 (quoting Wade, 388 US at 228). "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." Stovall, 388 US at 302. See P. Wall, Eye-Witness Identification in Criminal Cases 83 (1965). The presentation of a single suspect to an eyewitness for possible identification has been called "the

most grossly suggestive identification procedure now or ever used by the police." P. Wall, Eye-Witness Identification in Criminal Cases 28 (1965).

Under the facts of this case, there was no need for an immediate confrontation. The complainant was not near death. There was no reason why he could not have visited the jail. There was no reason why "the usual police station line-up" could not have been conducted. Such a confrontation, with all the proper safeguards of a corporeal lineup, was not "out of the question." Mr. Hickman should have been afforded the right to counsel. Cf. Stovall, 388 US at 302; Dixon, 85 Mich App at 279-281.

Moreover, Mr. Hickman possesses "an independent constitutional basis for challenging lineup procedures conducted before the initiation of adversary judicial proceedings that are so unnecessarily suggestive and conducive to irreparable mistaken identification that they amount to a denial of due process." Anderson, 389 Mich at 168; Stovall 388 US 293. In Manson v Brathwaite, 432 U S 98, the United States Supreme Court rejected a *per se* exclusionary rule for suggestive pretrial identification procedures. The majority of the Court was confident that the "totality of the circumstances" approach of Biggers would adequately serve the purpose of deterring the police from employing unnecessarily suggestive procedures. The Court concluded that "reliability is the linchpin in determining the admissibility of identification testimony . . . ." Manson, 432 US at 114.

Federal courts after Manson have followed a two-step analysis to determine if an identification procedure violates the Due Process Clause of the United States Constitution. The first step requires the Court to determine whether the identification procedure was unduly suggestive. If the procedure was unduly suggestive, the court must then determine whether the

suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

In Neil v Biggers, 409 US 188, the United States Supreme Court discussed the factors to be considered when determining whether in-court identifications are reliable even though the pretrial confrontation procedure was suggestive. Those factors include the opportunity of the witness to view the offender, the witness' degree of attention, the accuracy of any prior description of the offender, the level of certainty demonstrated by the witness, and the length of time between the offense and the confrontation. Id. at 199.

In Michigan, the Supreme Court in Kachar, 400 Mich 78, established a totality of the circumstances test (which this Court adopted in Gray, 457 Mich at 116 n11) similar to that enunciated in Biggers for showing whether a proposed in-court identification has a basis independent of the influences of a prior suggestive procedure. The Court in Kachar listed eight factors to be considered: 1) whether there is any prior relationship between the witness and the defendant; 2) the opportunity to view the offense; 3) the length of time between the offense and the disputed identification; 4) the accuracy or discrepancies in the description given by the witness and the defendant's actual appearance; 5) whether there was any previous proper identification or failure to identify the defendant; 6) whether the witness previously identified another person as the offender; 7) the nature of the offense and the state of mind of the witness at the point of viewing the offender; and 8) whether the defendant has any idiosyncratic or special features. Kachar, 400 Mich at 95-96. On review, a Court should weigh the various factors, and determine whether the prosecution has established by clear and convincing evidence that a sufficient independent basis exists to purge the taint of any suggestive procedure. See id. at 97. See also Wade, 388 US 218; Simmons 390 US 377.

Application of the Kachar and Neil factors to the evidence in this case leads to the conclusion that the complainant did not have an independent basis for his in-court identification of Mr. Hickman.

1) Prior relationship:

There was no evidence that the complainant, Mr. Walker, had any prior relationship with Mr. Hickman or that he had ever seen him before. (14a; 43a; 102a, 125a). This factor does not support finding an independent basis for identification.

2) Opportunity to observe:

The robbery occurred at 2:00 in the morning. It was dark outside. The complainant testified that even though it was dark outside, the area of the robbery was "pretty well lit" by a light at a nearby car wash and a street light. The complainant said that the entire incident lasted only 3 to 4 minutes. He said that he was able at times to look directly at his assailants from approximately 3 to 4 feet away or at about arm's length. He also said that he had been drinking that night and had just tried to buy more beer, soda, and chips at the Circle K party store. He also testified that he was "aroused" by the assault but was able to maintain his composure. (13a, 15a; 29a, 31a; 36a, 40a; 123a-124a, 135a).

In Biggers, the victim spent what the Court characterized as a considerable amount of time with her attacker, about half an hour. She was able to observe him in her lit home and then outside under a full moon. At least twice she was face to face with him directly and intimately. Biggers, 409 US at 200.

In Gray, the assault lasted a full hour where at times the lighting was good at the store from which she was abducted, and by the time the incident occurred it was becoming daylight. She was also forced into intimate face to face contact with the man. She was twice forced to kiss

him on the lips. When she was forced to have intercourse with him, the assailant's head was "[r]ight in front of my face."

According to this Court in Gray, the "witness' opportunity for observation during the crime is the factor most frequently considered in both independent source and reliability cases. Whether it is a supporting or negating factor depends on the facts of each case." Gray, 457 Mich at 117. Generally, Courts have held that witnesses have a better opportunity to observe when the crimes last longer. This Court also stated that Courts often find that rape victims usually have a better opportunity to observe their attackers than victims of other crimes. Id.

On the basis of the facts of this case, and compared with Gray and Biggers, the complainant did not have a "substantial opportunity" to view the robbers.

3) Length of time between offense and confrontation:

Although there was testimony about the time frame between the robbery and the on-the-scene confrontation, that evidence was conflicting. The police and the complainant estimated the time between the robbery and the identification as anywhere from twenty to thirty minutes. But Mr. Hickman estimated the time he spent in the police car alone to be more like fifty-five to sixty minutes. (40a; 83a).

In Anderson, this Court stated that among the recognized justifications for absence of counsel at eyewitness identification procedures is "*prompt*, 'on-the-scene' corporeal identifications '*within minutes of the crime.*'" Anderson, 389 Mich at 187 n23 (citing Russell, 408 F2d 1280) (emphasis added). In Russell, the Court held that the "immediate on-the-scene confrontation" did not infringe on due process. The Court specifically made it clear that "this case approves only those on-the-scene identifications which occur within minutes of the witnessed crime." Russell, 408 F2d at 1283-1285, 1284 n20). But in Rivers, the Court

concluded that where a significant amount of time has passed between the time of the assault and the identification, and there is no emergency requiring an immediate confrontation, the suspect should be told of his right to counsel, and absent an intelligent waiver, identification evidence should not be admitted at trial. Rivers, 400 F2d at 940. Cf. Dixon, 85 Mich App at 279-281.

4) Accuracy or discrepancies in the description:

Mr. Hickman's arrest, prior to the identification procedure, was based on a generic description that could have fit most males in the neighborhood where the offense occurred, and the complainant's description of his assailants was, as it turned out, inaccurate. Sergeant Vanderhaar testified that the radio dispatch he heard described the suspect as a black male, dressed in black and wearing a red hat. (69a-79a). Using that description, he drove around the area of the reported robbery, saw Mr. Hickman walking across the street and, according to him, chased him down and arrested him.[1] But the radio report was hardly descriptive. It was more generic than individual. It described what was surely characteristic of a very large segment of the male population of that neighborhood: a black male. And the clothes description was also generic. All black clothing is a popular style of dress, and red hats are also common. In fact, many neighborhood residents, unrelated to gang activity, wear certain colors to distinguish them from other neighborhoods.

But even more revealing in this case were the inaccuracies in the complainant's description and the discrepancies in his police statements and court testimony. At the preliminary examination the complainant testified that Mr. Hickman wore "a black hood, with

---

[1] To the contrary, Mr. Hickman testified that he was walking to his cousin's house when he was stopped by the police and arrested. As he neared his cousin's house a police car pulled up and an officer put him in the car and handcuffed him. He denied that he ran from the police. (205a-209a, 210a-215a).

black joggin' pants on and a red hat." He did not describe the age, size, or facial or any other physical features. When asked if he wore jewelry, he stated that Mr. Hickman wore a necklace that he "thought . . . was a cross, but it was a, it was a dollar sign." (10a-11a). He told the police that one of his assailants wore a cross on a chain around his neck. (16a). At the motion hearing he also admitted that he told the police that his assailant wore a gold cross around his neck. (50a). At trial he also admitted that he was wrong about what one of the robbers wore around his neck. He told the police that the robber wore a cross around his neck, but when he saw Mr. Hickman in the police car he changed his story to conform to what he saw Mr. Hickman wearing in the police car-- a dollar sign medallion around his neck. (109a-110a, 128a; 190a).

The complainant testified that the robber wore "a black hoody, sweat shirt type, with a zipper, red hat." (110a). He also testified that the sweatshirt did not have a zipper. The sweatshirt in evidence did not have a zipper. (127a-130a).

The complainant was simply wrong about his description of the pants Mr. Hickman wore. He told the police, and testified at the preliminary examination, that the robber wore black jogging pants. At trial his testimony was less than clear, but he stuck to his story that the person who robbed him, who he identified as Mr. Hickman, wore black jogging pants. However, the evidence bag containing the clothes Mr. Hickman wore when arrested contained a pair of black denim jeans with rolled up cuffs. (10a-11a; 128a-132a).

The complainant described the hat the robber wore as "just a red hat." (127a). The hat in evidence, seized from Mr. Hickman at the time of his arrest, was red with a prominent New York Yankees logo on the front. The complainant did not mention to the police, nor did he ever testify, that the robber's hat was anything but "just a red hat." (109a-110a, 127a, 133a, 137a).

When Mr. Hickman was arrested he wore a red hat with a New York Yankees emblem on the front.

Defendant Hickman fit the general description given by the complainant. But the point is that the description was so general it was virtually meaningless. The police arrested a suspect that fit a very general description of many, if not most, of the males in that neighborhood. It just happened to be Mr. Hickman. In addition, the complainant failed to describe any distinguishing features about the robber's physical looks. And when he did offer details regarding some of his observations, he failed to accurately describe many of them. Accordingly, this factor cannot be accorded much weight.

5) Any previous identification of or failure to identify the accused:

There is no record that there was a previous identification or misidentification in this case. The procedure at issue in this case is the only record confrontation occurring in this case.

6) Prior identification of someone other than the accused:

There was no record that the complainant identified someone other than Mr. Hickman, and codefendant Harris.

7) Witness' physical and psychological state:

Mr. Walker, the complainant, was subjected to a highly emotional and traumatic event. He said that a gun was pointed at his face while being robbed and that he was hit in the face by one of the robbers. A police officer testified that Mr. Walker was mad and upset. Officer Lipe said that Mr. Walker was angry, he would not stand still, he was mad that he had been robbed, and talked in a raised voice. Mr. Walker testified that he was somewhat frightened and "aroused," but was able to maintain his composure. Mr. Walker admitted that after the incident he started for home to get a gun and settle things himself. He said he changed his mind and

called the police instead. Mr. Walker also admitted that he was drinking that night and that he was just at the Circle K store attempting to buy more beer, soda pop, and chips. (12a, 15a, 16a; 31a, 41a; 123a-124a, 127a; 188a-189a).

The on-the-scene identification occurred within 25 to 60 minutes of the robbery. The witness was still in the grip of the trauma of the event and under the influence of his emotions and perhaps even alcohol.

8) Idiosyncratic or special features of Defendant:

There was nothing on the record indicating that the robber possessed idiosyncratic or special features. The complainant's testimony was actually to the contrary. The complainant's description was at best a generic description that could have fit most males in the neighborhood where the offense occurred. Sergeant Vanderhaar testified that the radio dispatch he heard described the suspect as a black male, dressed in black and wearing a red hat. (69a-79a). But the radio report was hardly descriptive. It was more generic than individual. It described what was surely a very large segment of the male population of that neighborhood: a black male dressed in all black with a red hat. The evidence does not militate toward an independent basis.

The instant on-the-scene identification was an impermissibly suggestive confrontation. The procedure was so suggestive that it created a substantial likelihood of a misidentification. Analysis of the totality of the circumstances leads to the conclusion that there existed an insufficient independent basis for the in-court identification of Defendant Hickman. Specifically, there was no evidence of a prior relationship between the complainant and Mr. Hickman and there was insufficient opportunity for the complainant to observe his assailants. It was a relatively short period of time at night under the stress of a traumatic and life threatening experience. The complainant had not identified Mr. Hickman at any other type of confrontation

before identifying him on the scene while he was still in the grip of what was an admittedly frightening and maddening incident that provoked the complainant to consider going home and getting a gun and taking care of the situation on his own. Moreover, the description was generic and nonspecific. And where details were supplied, they were as often mistaken as they were accurate.

Defendant Hickman asserts two grounds for error in the instant case. First, he should have been afforded the right to counsel. The United States and Michigan Constitutions provide that in criminal prosecutions the accused has the right to the assistance of counsel for his or her defense. US Const, Am VI; Const 1963, art 1, § 20. The Fifth Amendment right against compelled self incrimination and to due process is a prophylactic right found in the Supreme Court's jurisprudence. US Const, Am V; Const1963, art 1, § 17. The Fifth Amendment right to counsel "is designed to counteract the 'inherently compelling pressures' of custodial interrogation" and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse "with the police only through counsel." McNeil, 501 US at 176.

Under the facts of this case, there was no need for an immediate confrontation. The complainant was not near death. There was no reason why he could not have visited the jail. There was no reason why "the usual police station line-up" could not have been conducted. Mr. Hickman was not a flight risk, he was handcuffed in the back seat of a police car. Such a controlled confrontation at the police station, with all the proper safeguards of a corporeal lineup, was not "out of the question." Mr. Hickman should have been afforded the right to counsel. See Wade, 388 US 218; Rivers, 400 F2d 935. Cf. Stovall, 388 US at 302; Dixon, 85 Mich App at 279-281.

Second, Mr. Hickman was denied due process where the on-the-scene identification was so impermissibly suggestive that it created a substantial likelihood of a mistaken identification. Stovall and Anderson established a due process right of suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. Where the Sixth Amendment holdings in Wade and Gilbert do not apply, Stovall articulated an analogous Fourteenth Amendment right to a fundamentally fair lineup procedure. Subsequently, Biggers and Kachar articulated factors to analyze where there exists a claimed unnecessarily suggestive identification resulting in a violation of due process. Federal courts now follow a two-step analysis to determine if an identification procedure violates the Due Process Clause of the United States Constitution. The first step requires the Court to determine whether the identification procedure was unduly suggestive. If the procedure was unduly suggestive, the court must then determine, using the Biggers factors, whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

This Court, in Gray, adopted the federal approach in other cases involving impermissibly suggestive identification procedures. The Court first held that the photographic show up amounted to a highly suggestive identification procedure. The Court said that the next step in its analysis was to determine whether the victim had an independent basis to identify the defendant in court. In order to make that determination the Court employed the totality of the circumstances test articulated in Biggers and Kachar.

Defendant-Appellant urges this Court to adopt a two-prong approach to safeguarding the rights of suspects subjected to suggestive identification procedures. First, where a suspect is subjected to an unnecessarily suggestive on-the-scene identification procedure the Court should determine if the circumstances in the particular case dictate affording the defendant the full rights

attendant to a police station identification procedure, including the right to counsel. Some factors to consider are the temporal proximity of the offense and the identification procedure, geographic proximity of the crime or identification scene and the police station or other suitable site for a corporeal lineup, exigent circumstances like grave injury, illness, flight risk, or other reason for unavailability of the witness or victim requiring an immediate on-the-scene procedure, and any other reasons why the usual police station lineup is out of the question. Where there is no need for an on-the-scene identification without counsel, a suspect should be taken to the police station and provided a corporeal lineup with the assistance of counsel.

Where a lineup is determined to be out of the question, this Court should adhere to the two-step approach used by federal courts and adopted by this Court in Gray. The Court should first determine whether the on-the-scene identification procedure was unduly suggestive. Then, if the procedure is found to be unduly suggestive, the Court must then determine, using the Kachar factors, whether the suggestive procedure, given the totality of the circumstances, created a substantial risk of irreparable misidentification at trial.

The importance of constitutional protections for all identification procedures cannot be overstated. Thirty years ago this Court recognized that it is a "scientifically and judicially recognized fact that there are serious limitations on the reliability of eyewitness identifications of defendants." Anderson, 389 Mich at 172. It was further recognized that it is a "historical and legal fact that a significant number of innocent people have been convicted of crimes they did not commit" based on eyewitness identifications. Id. This Court in Anderson annexed a survey of "the scientific support for the limitations on the reliability of eyewitness identification and the significant legal record of proven misidentification" as an appendix to its decision. Id. at 192-220. The United States Supreme Court has also recognized the dangers inherent in eyewitness

identification evidence. Wade, 388 US 218, 228. The scientific evidence on the unreliability of eyewitness identification has continued to mount since these decisions. See Kurylczyk, 443 Mich at 320 (quoting Sobel, Eyewitness Identification, § 1.1, pp 1-2 to 1-3).

Numerous studies have shown that commonly held assumptions about the creation of memories and the accuracy of identification are wrong, and that many of the factors affecting the reliability of eyewitness impressions are counter-intuitive. See United States v Smithers, 212 F3d 306, 316 (CA 6, 2000); United States v Downing, 753 F2d 1224, 1231 (CA 3, 1985); Roger V. Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am Crim L Rev 1013, 1022 (1995). "Contrary to popular understanding, our eyes and memories do not operate like a camera on which events are accurately recorded subject to retrieval at any time, but in fact memory can be altered to a significant extent by information perceived after the fact." Kurylczyk, 443 Mich at 320 (citing Sobel, Eyewitness Identification, § 1.1, pp 1-2 to 1-3).

Following her review of the National Institute of Justice Research Report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, then Attorney General Janet Reno directed the National Institute of Justice to address the pitfalls in those investigations that may have contributed to wrongful convictions. The most compelling evidence in the majority of the twenty-eight cases reviewed was the eyewitness testimony presented at trial. The institute initiated a study for the purpose of recommending the best practices and procedures to use in eyewitness investigations. It was acknowledged that research has revealed that a witness' memory can be "fragile." The Planning Panel agreed that eyewitness evidence can be improved and made more reliable by applying currently accepted

scientific principles and practices. See *Eyewitness Evidence: A Guide for Law Enforcement,* U. S. Department of Justice, 1999, at 3-4.

In the report, Attorney General Reno stated that recent cases in which DNA evidence was used to exonerate individuals who were convicted primarily on the basis of eyewitness testimony demonstrate that eyewitness evidence is not infallible. And because eyewitnesses frequently play a vital role in criminal prosecutions, "it is absolutely essential that eyewitness evidence be accurate and reliable." To ensure accurate and reliable eyewitness information, investigators need to follow sound protocols. Id. at iii.

The National Institute of Justice research report concluded that scientific research indicates that corporeal lineups and photographic arrays are more reliable when the individual lineup members or photographs are shown to the witness sequentially, one at a time rather than simultaneously. The study also found that "blind" identification procedures where the investigator conducting the procedure does not know the identity of the actual suspect are more reliable. Psychological research indicates that unintentional cues such as body language and tone of voice which may negatively influence the reliability of eyewitness evidence can be avoided with "blind" identification procedures. See id. at 8-9.

Eyewitness identifications are the primary source of evidence brought against defendants. Every year more than 77,000 individuals become criminal defendants based on eyewitness identifications. Eyewitness identification is also the proven primary cause of wrongful convictions. 77.69% of the first 130 post-conviction DNA exonerations in the United States involved mistaken eyewitness identifications. Eyewitness identification is a law enforcement tool containing a dangerous mixture of frequency and fallibility. See *Actual Innocence*, Barry Scheck, Peter Neufeld and Jim Dwyer, New American Library 2003 at 353, 365.

Three leading researchers on eyewitness evidence suggest ways to improve eyewitness reliability in criminal investigations. First, all lineups, photo arrays, on-the-scene showups, and all other identification procedures should be videotape recorded. The most crucial moments are those surrounding the identification, but only the investigator and the witness are present. Without a videotape record it is hard to later reconstruct bias, suggestiveness, hints, or cues. Second, "blind" identification procedures should be employed. To avoid dropping hints or cues, the examiner should not know the identity of the actual suspect. Third, the witness should be asked to rate his or her certainty at the time of the identification. Fourth, police and prosecutors should be trained about the risks of providing corroborating details. See *Actual Innocence* at 98-99. See also *Eyewitness Testimony*, Gary Wells, Carswell Legal Publications, 1988; *Mistaken Identification: The Eyewitness, Psychology, and the Law*, Brian L. Cutler and Steven D. Penrod, Cambridge University Press, 1995; *Eyewitness Testimony*, Elizabeth Loftus, Harvard University press, 1996.

The suggested reforms do not necessarily require new legislation. They could be accomplished by policy changes at the local level, and enforced by the courts, to improve both crime fighting and justice. In Wade, Justice Brennan wrote: "We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification." Wade, 388 US at 235.

Defendant Hickman was subjected to an identification procedure fraught with all the now well recognized inherent dangers of misidentification. The psychological and social literature regarding the unreliability of eyewitness evidence, and universal recognition by the courts, is now legion. The conviction and incarceration of an innocent person is constitutionally

intolerable. Courts can minimize the risks of prosecuting the innocent without undermining the prosecution of the guilty. Armed with the ammunition of history, and through its constitutionally granted power to create law and enforce policy, this Court can extend justice while at the same time improve crime fighting.

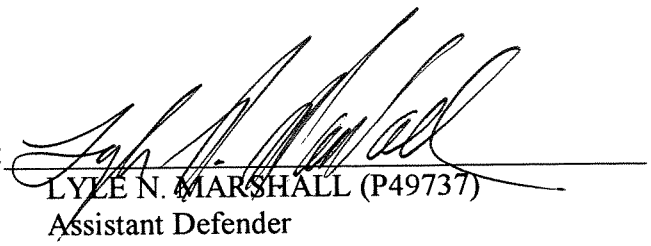
In the instant case, the on-the-scene identification procedure deprived Mr. Hickman of the right to counsel and due process of law. The procedure was unduly suggestive and conducive to irreparable misidentification and the in-court identification should have been suppressed. Therefore, this Court should reverse Defendant's convictions.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant the relief requested.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

LYLE N. MARSHALL (P49737)
Assistant Defender
340 Business and Trade Center
200 Washington Square, North
Lansing, MI 48913
(517) 334-6069

Dated: December 23, 2003